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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 11-14652 (JMP) ; Adv. Pro. No. 11-02782

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In the Matter of:
CONTEST PROMOTIONS-NY LLC,
Debtor.

- - - - -x

CONTEST PROMOTIONS-NY LLC
Plaintiff,
- against -
THE CITY OF NEW YORK,
Defendant.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

November 15, 2011
10:11 AM

B E F O R E :
HON. JAMES M. PECK
U.S. BANKRUPTCY JUDGE

1 declarant, which declined to appear today, to talk about harm
2 to the city if this relief is granted pending a determination
3 on whether the city will be successful in overturning the
4 relief that the debtor already has obtained in the state court
5 below.

6 So from our perspective, I think that's just one more
7 thing I would mention to Your Honor, that, on the balance,
8 that's where this really comes into sharp focus. It's the
9 ongoing future of this company, plus the stake of all the
10 indemnities, weighed against the city's asserted interest in an
11 enforcement policy which, granted, is worthy of some weight but
12 less so, we believe, when the state court already has
13 decisively ruled against it. Thank you, Your Honor.

14 THE COURT: Okay. Thank you all. I think we've taken
15 our share of breaks today, but we're going to take one more.
16 I'm going to take about a ten minute break and I'm going to
17 gather my thoughts and endeavor to provide a ruling this
18 afternoon. So I'll see you in about ten minutes.

19 (Recess from 3:28 p.m. until 3:38 p.m.)

20 THE COURT: Be seated please. I recognize that the
21 matter before the Court is of a potentially critical
22 significance to the viability of this Chapter 11 case. And I
23 accept the statements made by debtor's counsel concerning the
24 vital nature of the relief being sought on behalf of his
25 client, Contest Promotions.

1 I've reviewed all the papers and the declarations and
2 I've paid careful consideration to the arguments that have been
3 made today as well as the testimony of Rick Del Mastro and
4 Robert Hochman. I regret to inform the debtor that I do not
5 believe that the standards applicable to the grant of a
6 preliminary injunction have been met here.

7 As the debtor's own moving papers state at page 14,
8 the standard in the Second Circuit is clear. A party seeking a
9 preliminary injunction must show (1) a likelihood of irreparable
10 harm in the absence of the injunction; and (2) either a
11 likelihood of success on the merits where sufficiently serious
12 question is going to the merits or the balance of hardships
13 tipping decidedly in the movant's favor.

14 It's questionable whether either of these standards
15 has been met, but nothing has been shown with respect to prong
16 number 2, a likelihood of success on the merits and a
17 sufficiently serious question going to the merits.

18 As to a likelihood of irreparable harm, that may be a
19 closer question but I find that there has been a failure to
20 show irreparable harm here. One of the reasons for that is
21 embedded in the testimony of Mr. Hochman who responded to a
22 number of questions in a very thoughtful and helpful way to the
23 Court. But he also demonstrated, at least to my understanding,
24 that, as the city has contended, there is a robust
25 administrative law process which is available and has always

1 been available to this debtor to deal with issues of
2 enforcement.

3 Perhaps most significantly, the debtor is relying upon
4 the efficacy of a judicial determination made by Justice
5 Rakower which is currently on appeal.

6 The debtor finds itself, in what seems to be, a
7 terrible dilemma. Based upon what has been represented in
8 court, it seems to me that a successful appeal by the city of
9 Justice Rakower's decision does nothing to change the current
10 state of play at the administrative law level because, as has
11 been noted, the debtors prevailed before Justice Rakower with
12 respect to the relief that was there being sought. But based
13 upon my understanding of that relief, it does not really go to
14 the penalty phase of this enforcement action rather it
15 indicates in a rather theoretical way, from my perspective,
16 that the business model can be consistent with an accessory
17 use. It does not declare, as I read the decision, that the
18 Environmental Control Board or any administrative law judge
19 needs to follow that business model with respect to a
20 particular use.

21 As I said at the outset of this proceeding, I was
22 concerned about the excessive reliance upon business model and
23 insufficient reliance on actual application of the model in the
24 field. No evidence was presented here with pictures and
25 schematics of what these signs look like. I know what the

1 signs look like because I've seen them in the submission made
2 by the city but I'm not considering that as evidence because
3 they haven't been offered into evidence.

4 Nonetheless, if the debtor is going to carry its
5 burden of, in effect, seeking to have this Court trump the
6 state court system with respect to a state law city-based
7 scheme of regulation, quite a bit more needs to be shown than
8 was shown here today. Because the relief that is being sought
9 is not just a preliminary injunction, it's an intervention.
10 The debtor is seeking to have a federal court override the
11 existing regulatory regime which carries within it appellate
12 rights. I am loath to do that on this record and I'm not sure
13 I am willing to do it on any record. For that reason, the
14 likelihood of irreparable harm, in my view, has not been shown
15 because of the existing parallel ability to obtain some form of
16 relief in the state court system.

17 I'm also troubled for the reasons expressed that what
18 is being sought here is, in effect, a bankruptcy override of
19 determinations made not only by the Environmental Control Board
20 and administrative law judges who function within that scheme,
21 but also, in effect, an interpretation of Justice Rakower's
22 decision.

23 I've looked at the transcript and I've looked at the
24 order and to the extent that the debtor needs relief, I urge
25 that that relief be sought from courts of competent

1 jurisdiction with actual expertise in the area of zoning and
2 advertising.

3 As to the second prong of the standard for granting a
4 preliminary injunction, there's really nothing in the record
5 that I can point to and nothing has been pointed to by counsel
6 demonstrating that there is a likelihood of success on the
7 merits with sufficiently serious questions going to the merits.
8 The principal reason that I find this prong not having been
9 satisfied is that the only evidence that has been presented has
10 been presented through Mr. Del Mastro who is really not in a
11 position to talk about the merits of the litigation and by Mr.
12 Hochman who is simply talking about the administrative law
13 process. Nothing has really been presented with respect to the
14 merits of the litigation itself against the city.

15 Now, embedded in all this is an unproven hypothetical.
16 That hypothetical is that the city is involved in harsh
17 treatment of this particular company, that its enforcement
18 regime is being used deliberately to abuse this debtor. I see
19 no evidence of that. That doesn't mean that it isn't possibly
20 true, it's just that based upon the evidence presented no one
21 from the city has been deposed, to my knowledge. No one from
22 the city has been subpoenaed, to my knowledge. No one from the
23 city has offered any testimony concerning the application of
24 its regulatory regime with respect to this debtor and how it
25 compares with any other party that may be involved in outdoor

1 advertising or accessory signs within the City of New York.

2 For that reason, the record is largely silent as to
3 one of the most fundamental questions before the Court which
4 is, is the city acting unfairly here. Is there something
5 illegitimate about the way in which they are going after this
6 company and imposing harsh fines, treating these signs as
7 advertising rather than as accessory uses? I understand that's
8 how they have been treating the signs. What hasn't been
9 presented is that that's unfair or that they're acting
10 unreasonably, or there's anything incorrect about the
11 administrative judgments and treating these as, I'll call them
12 nonconforming uses.

13 Accordingly, the debtors' motion for a preliminary
14 injunction is denied but that doesn't necessarily mean that at
15 some time at a future point in this litigation if the
16 litigation is still alive and if the Chapter 11 case or some
17 other case under the Code is still alive that it may not be
18 possible to present evidence that would support the claims that
19 have been made against the city. That evidence hasn't been
20 presented here.

21 Now, let me turn to the question, briefly, of Section
22 362(b)(4) and the exception from the automatic stay of Section
23 362(a) for the exercise of police and regulatory powers by a
24 governmental unit. The ongoing enforcement activity of the
25 city appears to fit squarely within that exception but I don't

1 need to make that determination now. I don't need to make that
2 determination in the context of denying the motion for
3 summary -- excuse me -- for preliminary injunction.

4 In effect, the city is at its peril in continuing to
5 enforce on the strength of that exception knowing that it is
6 the debtors' legal position that the exception does not
7 properly apply. Whatever rights and remedies may flow from a
8 proven violation, can be presented at some future time. In as
9 far as what this means to the case, that's for the parties to
10 determine. And I have nothing more to add so we're adjourned.
11 Thank you.

12 MR. RAICHT: Your Honor, before we adjourn, one last
13 point. Is it based upon this record, is there -- would the
14 Court give consideration to issuing a limited stay for the
15 purpose of the debtor seeking redress in a state forum, an
16 appropriate state forum, and to lift the automatic stay to the
17 extent it applied to any such relief we might seek in that
18 state forum?

19 THE COURT: Well, let me just deal -- I'll give the
20 parties a chance to respond to this. I don't see any immediate
21 and irreparable harm here that requires a stay. Based upon the
22 record that has been presented, there's no indication that
23 tomorrow or next week there's going to be a taking of assets or
24 an interruption of the debtors' ability to operate by virtue of
25 the city's regulatory activities. In fact, my takeaway from

1 Mr. Hochman's testimony was that this is a somewhat time-
2 consuming process. I recognize that there is the potential for
3 harm to the business model by virtue of the impact of these
4 fines on the property owners and store owners, the various
5 proprietors that are potentially liable along with Contest
6 Promotions. I see no proof here that there is any immediate
7 risk with respect to even that group because while there has
8 been some general statements, there have been general
9 statements made by the two witnesses concerning the role played
10 by these individuals, nobody has said that immediately
11 somebody's going to tear down a sign or stop doing business.
12 There's nothing in the record to confirm that risk. And to the
13 extent that any party who is not a property owner identifies
14 that risk, it's not competent evidence; it's pure hearsay.

15 No property owner, no store owner came here as a
16 witness. Everything with respect to that aspect of the case is
17 suggestion rather than proof at the moment. I am not inclined
18 to impose any stay and believe that if there is a concerted
19 effort by the debtors to pursue relief in a court of competent
20 jurisdiction within the state system there's time to do that.
21 If I'm wrong, I'm sorry about those consequences but today's
22 record didn't prove an entitlement to any relief.

23 We're adjourned.

24 MR. RAICHT: Thank you, Your Honor.

25 (Whereupon these proceedings were concluded at 3:56 p.m.)